UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

PAUL RICHARD,	)	
	)	
Petitioner	)	
	)	
v.	)	Civil No. 97-0228-B
	)	
KENNEBEC COUNTY SHERIFF,	)	
	)	
Respondent	)	

RECOMMENDED DECISION

Petitioner has been incarcerated at the Kennebec County Jail since April, 1997, on an order of civil contempt. He challenges the custody pursuant to 28 U.S.C. § 2254 (1994 & Supp. 1997), arguing that his refusal to provide an ordered accounting in certain state court litigation was appropriately based on his assertion of his right under the Fifth Amendment to refuse to incriminate himself.

Petitioner argues that "[a]s a matter of public policy, federal courts should not allow a waiver of an individual's constitutional right against self-incrimination whenever the mere possibility arises that one might be subject to criminal penalties." Memo. at 13. The Court is satisfied that the United States Supreme Court adequately considers the public policy ramifications of its decisions, and in fact did so in the course of setting forth the present law regarding the Fifth Amendment. To the extent those policy considerations are articulated in Supreme Court decisions, and assist this Court in applying the law to Petitioner's case, they will not be ignored. Public policy considerations do not, however, form a cognizable ground for relief on a petition for a writ of habeas corpus. *See* 28 U.S.C. § 2254(a) (". . . a district court shall entertain an application for a writ of habeas corpus in behalf of

a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States").

Petitioner also argues that his "reasonable fear of self-incrimination," particularly in light of a pending criminal prosecution, renders his incarceration punitive rather than coercive. Memo. at 20. Petitioner cites a United States Supreme Court case for the proposition that "a civil contempt [becomes] invalid once its coercive purpose [is] no longer served." Memo. at 19. In that case, however, the coercive purpose was no longer served because the grand jury before which the contemnors were to testify ceased to exist. *Shillitani v. United States*, 384 U.S. 364, 371 (1966). Here, by contrast, Petitioner merely argues that he has no intention of providing the requested information because he is concerned about the pending criminal prosecution. This Fifth Amendment argument was raised before the state court prior to his incarceration and was rejected. It is not a new development rendering the civil contempt ineffective, and if it were, it could not be raised for the first time here. *See* 28 U.S.C. § 2254(b)(1) (requiring exhaustion, or the absence, of state remedies).

As noted, Petitioner's Fifth Amendment arguments were raised, albeit late, at both the trial and appellate levels, and both courts addressed the substance of his claims.[1] Under the Antiterrorism and Effective Death Penalty Act of 1996 ["AEDPA" or "THE ACT"], Petitioner bears a difficult burden overcoming the resulting decisions against him. Specifically, the Act amended 28 U.S.C. section 2254 to provide Petitioner with only two grounds upon which to challenge the State court rulings:

---

[1] Petitioner separates his Fifth Amendment claim into three specific arguments. First, he argues that his Fifth Amendment right was not waived by either his failure to raise it earlier in the underlying action or his provision of partial information in accordance with the state court's orders. Second, he argues that even if it was waived, the waiver was adequately withdrawn. Finally, he argues that his assertion of the right was timely and sufficient.

> (1) [that the State proceeding] resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) [that the State proceeding] resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d). Further, when a petitioner seeks to challenge the factual findings pursuant to subsection (2), he faces a formidable hurdle:

> In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

28 U.S.C. § 2254(e)(1).

In this case, the State courts found the following facts:

> 1. The original civil complaint against Petitioner in the underlying state action alleged violations of the Revised Maine Securities Act by offering and selling unregistered securities. Order, March 28, 1997, at 2.
>
> 2. The complaint resulted in a temporary restraining order, and following a hearing, a preliminary injunction, restraining Petitioner and the other defendants from continuing to sell such securities. In addition to the injunction, Petitioner was ordered to provide an accounting within 10 days showing the location and amounts of proceeds from the sale of securities by defendants and the identity of all known investors. *Id*. at 2-3.
>
> 3. Petitioner did not comply with the court's order to provide an accounting, and plaintiffs filed a successful motion to compel and for fees. *Id*. at 3.
>
> 4. Petitioner did not comply with the second order to produce the accounting, and plaintiffs filed motions for sanctions and contempt. *Id*.
>
> 5. Petitioner raised his Fifth Amendment rights as a defense for the first time at the hearing on plaintiffs' motion for contempt. *Id*.

> 6. Petitioner "raised no substantive basis for the late assertion of privilege nor [denied] the waiver of the privilege in all previous proceedings except to suggest that certain out-of-court statements by the plaintiffs' representatives indicated the possibility of criminal prosecution . . . ." *Id*.
>
> 7. The court issued an order of contempt, which order was reconsidered when Petitioner argued he was entitled to a hearing. *Id*.
>
> 8. Petitioner offered testimony from a witness who had been subpoenaed to testify before a grand jury investigating the matters at issue in the civil action, as well as documents tending to show that Petitioner had engaged in a "continuous campaign" to refuse to disclose the scope of the activities alleged to be prohibited in the civil complaint. In addition, the documents revealed that Petitioner was at the time seeking to engage further in activities barred by the preliminary injunction. *Id.* at 4.

On the basis of these factual findings, the trial court concluded, without citation to authority, that Petitioner had waived his Fifth Amendment right on at least two prior occasions. *Id*. at 6.

On appeal, the Maine Law Court affirmed the trial court's conclusion. *State v. Richard*, 697 A.2d 410, 415 (Me. 1977). The Law Court further noted that Petitioner's assertion that he had no reasonable apprehension of criminal prosecution prior to his first attempt to invoke the privilege was unpersuasive:

> First, Richard was sued directly for selling unregistered securities. Both the affidavit of the Securities Division's chief investigator filed in support of the motion for a temporary restraining order, and the preliminary injunction hearing testimony, indicate that months before filing its complaint the State had notified Richard that he had violated the Revised Maine Securities Act and warned him repeatedly to stop selling unregistered securities. The evidence indicates he did not heed that warning. The Act's criminal penalties apply to any knowing violation of its provisions, 32 M.R.S.A. § 10604(1), including that which prohibits the sale of unregistered securities, 32 M.R.S.A. § 10201. The accounting sought by the State required Richard to submit information concerning his securities sales and the disposition of the proceeds of those sales, information relevant to the very securities provisions he was alleged to have violated. Thus, by the time of the preliminary injunction hearing it would have been reasonable for Richard to apprehend that his submission of the accounting 'would furnish a link in the chain of evidence needed to prosecute the claimant for a . . . crime.'

Richard, 697 A.2d at 415-16 (quoting *Hoffman v. United States*, 341 U.S. 479, 486 (1951)).

Petitioner's assertion that the factual underpinnings of the state courts' conclusions amount to "an unreasonable determination of the facts in light of the evidence" is entirely conclusory. There is no suggestion in the record that Petitioner has any evidence that would tend to overcome the presumption that the findings are correct, particularly clear and convincing evidence, as is required. 28 U.S.C. § 2254(e)(1). Indeed, Petitioner appears to restate his position in his reply brief, filed November 25, 1997: "The essence of Mr. Richard's argument . . . is that the state system 'got it wrong' - *that the state courts misapplied the Supreme Court's precedent to the facts*. Reply at 6 (emphasis added).

The sole remaining question is as Petitioner anticipated: whether the state courts' analysis "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1). In this regard, the Maine Law Court stated the applicable law as follows:

> The Fifth Amendment privilege against self-incrimination is to be "accorded liberal construction in favor of the right it was intended to secure." *Hoffman*, 341 U.S. at 486, 71 S. Ct. at 818. However, "the great constitutional safeguard against self-incrimination was never intended to be used as a means of avoiding disclosure of the truth by [those] who only pretend a fear of proving themselves guilty of a crime, " . . . nor to serve as an obstacle to litigation's truth-seeking function when there is no real specter of criminal prosecution and therefore of self-incrimination. Such abuses are controlled by the law of waiver. The privilege is not ordinarily self-executing, it must be affirmatively claimed when self-incrimination is threatened, and a defendant may lose its benefit inadvertently, without making a knowing and intelligent waiver, simply by failing to invoke it. *Minnesota v. Murphy*, 465 U.S. 420, 427-28, 104 S. Ct. 1136, 1142-43, 79 L. Ed. 2d 409 (1984) (quotation omitted) . . . . The general obligation to appear and answer questions truthfully does not in itself convert a defendant's or witness's otherwise voluntary statements into compelled ones within the meaning of the Fifth Amendment, and "the incrimination nature of a question, by itself, [does not excuse] a timely assertion of the privilege." *Murphy*, 465 U.S. at 427-28, 104 S. Ct. at 1142 . . . . "[I]f a witness chooses to

> answer, his choice is considered to be voluntary since he was free to claim the privilege and would suffer no penalty as the result of his decision to do so," *id.* at 429, 104 S. Ct. at 1143; he will not be in a position later to complain that he was compelled to give testimony against himself, *United States v. Kordel*, 397 U.S. 1, 10, 90 S. Ct. 763, 768, 25 L. Ed. 2d 1 (1970).

Richard, 697 A.2d at 414-15.

This Court, and, indeed, Petitioner, agree with the statement of the law set forth in the Law Court opinion. Petitioner simply argues that it was an unreasonable application of that law to conclude that Petitioner had "'reasonable cause to apprehend danger from a direct answer'" prior to September, 1996, when he learned that the state was seeking to criminally prosecute him. Memo. at 12 (quoting *Hoffman*, 341 U.S. at 486). The Court disagrees with this view of the law. Petitioner's citation to cases in which the witnesses "clearly knew that criminal authorities were already investigating their conduct," including *United States v. Kordel*, 397 U.S. 1 (1970), does not convert the rule of law into a requirement that an actual investigation be underway.[2]

In light of the facts as found by the state courts and not contradicted by Petitioner, the state courts' conclusion that Petitioner did not timely assert his Fifth Amendment right to be free from compelled self-incrimination is certainly reasonable. Further, the Court need not spend much time on Petitioner's argument that the waiver was withdrawn after September of 1996. This argument is nothing more than a rephrasing of the original question: when did Petitioner have a reasonable

[2] Imagine the potentially extreme result of Petitioner's argument: a party in a divorce would be unable to claim the privilege when asked what happened to the couple's life savings if the savings were used to buy favorable testimony from another witness. Clearly, although no criminal investigation may be pending, the party should reasonably expect one to begin if a truthful answer is given.

apprehension of criminal prosecution such that he should have affirmatively asserted his Fifth Amendment privilege? The answer here is: earlier than he did.[3]

Conclusion

For the foregoing reasons, I hereby recommend the Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254 be **DENIED** without an evidentiary hearing. *See* Rule 8, Rules Governing Section 2254 Cases.

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) (1988) for which *de novo* review by the district court is sought, together with a supporting memorandum, within ten (10) days of being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to *de novo* review by the district court and to appeal the district court's order.

_____

Eugene W. Beaulieu
United States Magistrate Judge

Dated on March 3, 2000.

[3] Indeed, the Supreme Court no longer refers to the Fifth Amendment privilege as "waived," because the failure to assert the privilege need not be "knowing and intelligent." *Minnesota v. Murphy*, 465 U.S. 420, 427-28 (1984) (citations omitted).